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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD G. NILL,

Petitioner,

vs.

ESSEX GROUP, INC. and INDIANA BANK AND TRUST COMPANY OF FORT WAYNE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Employee Retirement Income Security Act of 1974 (ERISA, 29 U.S.C. 1001 *et seq.*) confer subject matter jurisdiction on the trial court enabling it to determine Nill's pension plan rights in a suit brought by the Trustee of the pension plan?

2. Do the amounts held in Nill's name in the auxiliary fund of the pension plan constitute "individual account" benefits payable to Nill under ERISA?

3. Does ERISA mandate the distribution to Nill of the monies held under his name in the auxiliary fund of the pension plan as a "participant" of the plan, notwithstanding that Nill is a retiree?

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OPINIONS BELOW

On August 3, 1982, the Allen Superior Court (Allen County, Indiana), entered a partial summary judgment in favor of petitioner, Richard G. Nill ("Nill"), ordering that Nill was entitled to a judgment for the amount of money remaining in his account in the auxiliary fund of a pension plan. A copy of the Memorandum Decision is printed in Appendix A.

In an Opinion issued May 10, 1984, the Court of Appeals of Indiana reversed the partial summary judgment for Nill and ordered that judgment be entered for respondent, Essex Group, Inc. ("Essex"). A copy of the Court of Appeals' Opinion, which is not published, is printed in Appendix B.

On August 21, 1984, the Court of Appeals denied Nill's Petition for Rehearing in an unpublished entry printed in Appendix C.

On November 16, 1984, the Supreme Court of Indiana denied Nill's Petition for Transfer in an unpublished entry printed in Appendix D.

JURISDICTION

This Petition arises from the denial of Nill's Petition for Transfer by the Supreme Court of Indiana on November 16, 1984.

Jurisdiction of this Court is invoked under U.S. Sup. Ct. Rule 17.1(c), 28 U.S.C.A.

STATUTES INVOLVED

Relevant portions of the statutes involved, those being 29 U.S.C. 1002(2), (7), (23)(B), (34), and (35), and 29 U.S.C. 1103(c)(1) and (2)(A), and 29 U.S.C. 1132(a) and (e), provide:

29 U.S.C. 1002:

"For purposes of this subchapter:

• • •

(2) The terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered

employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * *

(7) The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

* * *

(23) The term 'accrued benefit' means

* * *

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

* * *

(34) The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term 'defined benefit plan' means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated

as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan."

29 U.S.C. 1103:

"• • •

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d) of this section, or under section 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution."

29 U.S.C. 1132:

"(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i)

to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

* * *

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

STATEMENT OF THE CASE

On November 16, 1982, the Allen Superior Court, by the Honorable Robert L. Hines, entered a partial summary judgment for Nill declaring that he was entitled to the sum of $55,244.40 being held in an auxiliary fund under a certain pension plan being administered by Indiana Bank and Trust Company of Fort Wayne, Indiana ("Bank"), as Trustee, plus interest. Contributions to the plan had been made by Nill's former employer, Fort Wayne Tool & Die, Inc., which was purchased by Essex Group, Inc. ("Essex"). Nill's right to recovery was interpreted by the trial court in accordance with the provisions of ERISA and federal case law dealing with the interpretation of pension plans under ERISA. The trial court certified the entry of partial summary judgment as an appealable judgment. The trial court's Memorandum Decision is printed in Appendix A.

The judgment arose out of a declaratory judgment action brought by the Bank against Nill and Essex to determine the disbursement of the excess funds being claimed by Nill in the pension plan's auxiliary fund.

Upon the appeal by Essex, a pre-appeal conference was held in the Court of Appeals and an Order Upon Pre-Appeal Conference was entered May 13, 1983, printed in Appendix E. Numerous stipulations of fact were made in that Order.

The Court of Appeals issued its opinion on May 10, 1984. In essence, the opinion is an interpretation of the provisions of the pension plan wherein the Court concluded that Nill was not entitled to the excess amount in the auxiliary fund under the plan.

The Court of Appeals reversed the trial court's judgment in favor of Nill and ordered that final judgment be entered for Essex.[1]

Nill's Petition for Rehearing, to the Court of Appeals of Indiana, and Petition for Transfer, to the Supreme Court of Indiana, were denied.

Relevant Facts.

On April 20, 1961, Fort Wayne Tool & Die, Inc. established a Trust Agreement (pension plan) for its full-time salaried employees. Essex purchased Fort Wayne Tool & Die, Inc. in 1970. Pursuant to an amendment of the pension plan, Essex assumed the obligations of the employer under the plan. At that time, the number of participants under the plan became fixed.

Nill was the President of Fort Wayne Tool & Die, Inc. and negotiated the plan, as well as a salaried employee within the meaning of the plan.

At all relevant times, the Bank was the Trustee under the terms of the plan. Prior to June 2, 1976, Fort Wayne Tool & Die, Inc. and Essex made payments to the Bank pursuant to the terms of the plan on account of their payment obligations as the employer. Nill retired on June 2, 1976.

The pension plan was established by a Trust Agreement, relevant portions of which have been printed in Appendix F. The general stated purpose of the Trust was to provide participants with a death benefit and guaranteed retirement benefits. The Trustee was to procure insurance policies on the

---

[1] The Court of Appeals directed the entry of judgment for Essex notwithstanding that only a *partial* summary judgment had been granted for Nill and that the parties stipulated, in the Order Upon Pre-Appeal Conference, that the appeal did not involve a consideration of Nill's alternate common law claim for reformation of the pension plan.

lives of participants with an option to convert the policies into an annuity upon the normal retirement date of the participant. The Trustee was to divide trust funds into a general fund, for annual premium payments, and an auxiliary fund, for payments to be invested for the account of the individual to provide funding at retirement for the annuity.

The Trust funds were to be used for the exclusive benefit of the employer's employees or their beneficiaries, with no reversion to the employer. The Trust would terminate upon complete revocation or when there are no contracts subject to it and the employer has fulfilled all of his obligations.

The Trustee was required to keep a separate record of the amount deposited to the account of each participant, together with the accruals thereto. There was no provision for disbursement of the excess in the auxiliary fund except upon termination of the Trust, which then resulted in a distribution to participants of funds in the ratio that the reserve liability for each participant bore to the total of the reserves for all participants under the plan.

Upon this early retirement, Nill received a distribution of $117,536.35 in lieu of an annuity. After that distribution to Nill, there remained the sum of $55,244.40 in the auxiliary fund in the name of Nill. Nill has demanded payment of the $55,244.40, but no part thereof has been paid to Nill by either the Bank or Essex. Although both of Nill's employers made payments to the plan, it was Fort Wayne Tool & Die, Inc. that made the excess payments, not Essex.

At the time of Nill's retirement, the sums held in the auxiliary fund to the accounts of the other salaried employees exceeded the cost of the respective pension annuities in roughly the same proportions as Nill's auxiliary fund surplus bore to the cost of his pension annuity. The Bank maintained separate running accounts of the monies deposited in the auxiliary fund, showing what portion of the auxiliary fund the Bank had

allocated to each participant. The auxiliary fund monies were, in fact, commingled for purposes of investment. The $55,244.40 amount remaining in the auxiliary fund in Nill's name following the lump-sum distribution to him is consistent with the accounting kept by the Bank.

REASONS FOR GRANTING THE WRIT

The subject matter jurisdiction of a state court in ERISA cases is limited to those actions brought by a participant or beneficiary to recover benefits, or enforce or clarify his rights to benefits under a retirement plan. 29 U.S.C. 1132(a)(1)(B) and (e)(1).

In cases brought by a fiduciary to enforce ERISA provisions or the terms of a retirement plan, the federal courts have exclusive jurisdiction. 29 U.S.C. 1132(a)(3) and (e)(1); *Livolsi v. Ram Construction,* 728 F.2d 600 (3rd Cir. 1984).

This action was brought by Bank, as Trustee of the pension plan, for a declaration of Nill's rights under the plan. Bank is not a participant or beneficiary in the plan; therefore, the federal courts have exclusive jurisdiction.

Moreover, assuming that the Court of Appeals of Indiana correctly held that Nill was not a participant in the pension plan, *infra,* then there was no subject matter vested in the trial court to grant Nill's Motion for Partial Summary Judgment, from which the appeal arose. If Nill was not a participant or beneficiary in the plan, the state court lacked subject matter jurisdiction.

Accordingly, the Supreme Court of Indiana should have granted transfer on appeal and remanded the case to the trial court to be dismissed for lack of jurisdiction.

The appellate courts erred, as well, in interpreting the pension plan in question.

The Opinion of the Court of Appeals of Indiana (which was not disturbed by the Supreme Court of Indiana in denying Nill's Petition for Transfer) creates major problems and inequities in the administration of the pension plan. The interpretation of the pension plan contradicts provisions of ERISA. Nill's Petition herein should be granted in order to resolve these problems.

The appellate court observed that there was no express provision under the Trust Agreement for the disbursement of excess monies paid to the auxiliary fund. Rather than supply the missing provision by implication or remand the case to the trial court for further evidence, the Court of Appeals instead interpreted the plan so as to provide no benefits to Nill beyond his retirement annuity, notwithstanding excess funds in Nill's auxiliary fund account of $55,244.40.

This interpretation clearly ignores the references within the Trust Agreement to the "account of each individual" in the auxiliary fund and, instead, presumes that any excess payments to the individual accounts of the auxiliary fund will be distributed to qualified participants upon termination of the pension plan.

With a fixed number of participants in the pension plan after 1970, such a disposition of the excess auxiliary fund becomes a kind of lottery, with a windfall to the few remaining qualified employees at the time of the plan's termination. Of course, such a windfall would be payable only if there were *any* remaining participants at the time that the plan is terminated.

The Court of Appeals reasoned that Nill was *not* a participant eligible for distribution of the excess auxiliary fund because a "participant" under the plan must be a full-time employee and, hence, not a retiree. (Appendix B, p. 13a.) However, that interpretation leads to an anomalous result: if annuities have been purchased for all participants upon their retirement, there would be no one to share in the distribution of

the excess auxiliary fund. Since there is no reversion of payments to the employer under the Trust and under ERISA, pursuant to 29 U.S.C. 1103(c)(1), the excess auxiliary fund would never be paid to anyone. Such a result is contrary to the express intent of using the Trust funds for the exclusive benefit of the employer's employees or their beneficiaries, provided in the general statement of purpose in the Trust Agreement and under ERISA (29 U.S.C. 1103(c)(1)).

The trial court resolved any ambiguity in the pension plan with respect to distribution of the excess payments to Nill's auxiliary fund account by reasoning that the pension plan is a "hybrid" plan, having characteristics of both the "individual account plan" and "defined benefit plan" which are defined in 29 U.S.C. 1002(34) and (35), respectively. (Appendix A, pp. 1a-4a.)

An "individual account plan" is a pension plan whereby benefits are based solely upon the amount contributed to a participant's account. 29 U.S.C. 1002(34). While a "defined benefit plan" is defined as a pension plan other than an individual account plan, it may be treated as an individual account plan to the extent that a benefit is derived from employer contributions based partly on the balance of the separate account of a participant. 29 U.S.C. 1002(35). The "accrued benefit" under an individual account plan is the balance of the individual's account. 29 U.S.C. 1002(23)(B).

In this case, the trial court correctly reasoned that the pension plan provided a benefit from employee contributions based partly on the balance of a separate account of a participant inasmuch as the annuity for the participant was purchased from the funds in such separate account. The plan was a "hybrid", having the characteristics of a defined benefit plan, with the insurance being purchased from the general fund, and of an individual account plan, with the annuity being purchased from the individual's auxiliary account.

Such an interpretation gives meaning and purpose to the pension plan's establishment of separate individual accounts in the auxiliary fund. The suggestion advocated by Essex on appeal, that the separate accounts were established merely for management purposes only is not convincing, particularly when, as occurred here, Nill's account was overfunded by approximately $55,000.00. (Appendix A, pp. 4a-5a.)

The trial court's interpretation of the plan as a "hybrid" eliminates the possibility of there being an unpaid auxiliary fund with no participants to whom to make a distribution. Thus, the statutory mandate that the assets of a plan shall never inure to the benefit of an employer and shall only benefit the participants and their beneficiaries is served. 29 U.S.C. 1103(c)(1).

Moreover, the construction of the auxiliary fund as an "individual account plan", requiring a distribution to Nill of the amounts held in his account, eliminates the possibility of a windfall to the several surviving participants, if any, upon termination of the plan. Such result is consistent with the general objective of ERISA "to increase the number of individuals in employer-financed benefit plans and to 'assure that those who do participate actually receive benefits and do not lose benefits as a result of unduly restrictive forfeiture provisions or the failure of the pension plan to retain sufficient funds to meet its obligations.'" *In C.D. Moyer Trust Fund,* 441 F.Supp. 1128, 1131 (E.D. Pa. 1977), quoting [1974] U.S.Code Cong. & Admin.News pp. 4676-77.

The term "participant" under the plan means an employee who has met all of the *qualifications* necessary to participate in the plan. (Appendix F, p. 25a.) This definition should have been read as a threshold requirement for employee participation in the pension plan. Instead, the Indiana Court of Appeals employed the definition as a limitation upon payment of excess contributions to the auxiliary fund: a "participant" is an

"employee"; therefore, a participant must be a salaried person regularly employed on a full-time basis.

By interpreting "participant" as a limitation rather than a threshold qualifier, the Indiana Court of Appeals denied Nill any recovery of the amounts in his auxiliary fund account, leaving either a windfall to the few remaining full-time employees at termination of the plan, or to the employer, if all employees retired prior to termination of the plan.

Such an interpretation directly contradicts the ERISA definition of "participant" and decisions of federal courts considering the issue. A "participant" means "any employee or *former employee* of an employer". 29 U.S.C. 1002(7). A retiree is a participant in a pension plan established under ERISA. *See Stewart v. National Shopmen Pension Fund,* 563 F.Supp. 773 (D.C.D.C. 1983); *Nostrame v. Consolidated Edison Company of New York,* 504 F.Supp. 507 (S.D.N.Y. 1980).

Moreover, the Court of Appeals' restricted interpretation of "participant" is hardly consistent with other provisions of the pension plan which do not equate the term "participant" with "full-time employee". Section 5:01 of the plan refers to "the normal pension payable to a *retired participant* under this Trust. . . ." Section 18:01 of the plan refers to payments "to a participant who has died. . . ." Surely, a person cannot be employed full-time, but at the same time be either retired or dead. The problems with the Court of Appeals' interpretation are evident.

The only correct reading of the pension plan was made by the trial court, by interpreting the pension plan to be a "hybrid" plan, being both a defined benefit plan and an individual account plan. Any excess payments to Nill's auxiliary fund account should have been distributed to him as the accrued benefit of an individual account plan. Such an interpretation serves to maximize the benefits of the employees under the pension plan and, therefore, is consistent with the objectives of ERISA.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

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IN THE ALLEN SUPERIOR COURT
CAUSE NUMBER 2-77-2042

STATE OF INDIANA
COUNTY OF ALLEN } SS.:

Indiana Bank and Trust Company
of Fort Wayne,
Plaintiff,

vs.

Richard G. Nill and
Essex Group, Inc.,
Defendants.

**MEMORANDUM DECISION RE:
PARTIAL SUMMARY JUDGMENT
IN FAVOR OF RICHARD G. NILL**

A Motion for Partial Summary Judgment was brought before the Court by Defendant Richard G. Nill. Mr. Nill is requesting the Court grant him a judgment consisting of the money remaining in his account in the auxiliary fund.

The main issue in determining whether Defendant Nill should be granted summary judgment is whether the Fort Wayne Tool & Die Pension Plan was a hybrid plan. That is, did the pension plan combine a defined benefit plan with an individual account type plan.

The pension plan consisted of two accounts, the general fund and the auxiliary fund. The general fund was to consist of payments equal to annual premiums on insurance policies procured by the Trustee on the participants' lives and refunds or dividend credits from the policies. The auxiliary fund, which Defendant Nill claims is an individual account plan, was to consist of payments which were to be invested by the Trustee and accumulated so that at the normal retirement date the Trustee would have sufficient funds to pay the insurance company funds in order to convert the previously issued policy to an annuity. Each participant in the plan had an individual account, though the money was combined when invested.

The statutory definition of an individual account plan means a "pension plan which provides for an individual account for each participant and for benefits based solely upon the amount distributed to the participant's account, and any income, expenses, gains and losses and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S. § 1002(34). The plan in this case does provide for a defined benefit. The pension plan provides that each participant shall have the policy converted to an annuity. The benefit given to the participant is an annuity, not dependent on how much the individual account provides. In addition, the premiums are paid yearly through other funds.

Two cases are on point here, but they don't seem to clarify the problem. The first case *Teamsters Vs. Daniel* 58 L.E.d. 2d 808 in describing the pension plan in controversy there stated, that because the fund made the same payments to each employee who qualified for a pension and retired at the same age, rather than establishing an individual account for each employee tied to the amount of employer contributions attributable to his period of service, the plan provided a defined benefit. In examining the pension plan at bar, it should be noted that benefits do not depend on the amount of time served—but on when retirement is taken and salary. (Can salary be equated with time served?) 591 F. 2d 954.

The second case *Alabama Power Co. Vs. Dave's* defines both the defined benefit and defined contribution plan. The Court describes a defined benefit plan as a plan under which the benefits to be received by employees are fixed and the contribution is adjusted to whatever level is necessary to provide those benefits. It could be argued that in this instance the auxiliary fund fits the picture of an individual account, because the amount left in the Defendant's account far exceeded the amount necessary to purchase an annuity for him. The Court in *Alabama Power Co.*, continues to define the other type of pension plan, an individual account, as one where the employer's contributions are fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide, i.e. the remainder of the account is the amount he is entitled to.

The pension plan at bar does not make any provision where funds will be taken if the individual's account at retirement (early or otherwise) does not equal enough to purchase the participant an annuity. Nor does the plan state what will happen if the individual's account exceeds the amount necessary to purchase an annuity.

Statutory authority in regard to accrued benefits 29 U.S. § 1002(23) states that in the case of an individual account plan the accrued benefit is the balance of the individual's account.

Next it is imperative to turn to the statutory definition of a defined benefit plan 29 U.S. § 1002(35). The pertinent part of this provision states:

> The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant . . .

> (B) for the purposes of paragraph (23) of this section . . . shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

As referred to above § 1002(23) states that the accrued benefit is the balance of the individual's account.

The Fort Wayne Tool & Die plan provides for a defined benefit—an annuity shall be bought; it also provides for the premiums to be paid through the general fund. Therefore, the entire plan cannot be considered an individual account plan. It could be argued though that the auxiliary fund allows the plan to be classified as an individual account to the extent of its assets according to 29 U.S. § 1002(35). The plan in question does provide a benefit from employer contributions based partly on the balance of a separate account of a participant.

Defendant Essex Group alleges that the use of the individual account was for management purposes only. Essex contends that since the participants were insured for different amounts, the sums required to convert the insurance to an annuity are different in each case. This argument supports Essex's contention that a separate account, with joint investment of all accounts, is for a management purpose only. To counter Essex's argument, it could be pointed out that since Essex states that all participants were insured at varying amounts, all premiums would be different also. Though the funds for the premiums were all paid together with joint accounting through the general fund.

If the auxiliary account cannot be considered an individual account or does not fall within the provision of § 1002(35), a discussion of an actuarial mistake should take place. Defendant Essex contends that the overage in the auxiliary account was a simple actuarial mistake. It must be noted that the actuarial

mistake in this case amounted to approximately $55,000.00. This gross overpayment does not seem to be a simple mistake. Essex claims that they purposely overfunded the auxiliary accounts. Yet there is no provision in the plan for any dispersal of the excess funds in the auxiliary account. According to the Court in *In Re: C. D. Moyer Trust Fund* 441 F. Supp. 1128 employers are not to be penalized for overfunding in abundance of caution or as a result of a miscalculation on the part of the actuary. The Court continues and states that "employees are not to receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the plan on a sound financial basis".

The assets of the employee benefits are generally said to be held for the exclusive benefit of the participants. In order for the employer to have his contributions returned three conditions must be met:

(1) all liabilities of the plan have been satisfied;

(2) the distribution does not contravene any law;

(3) and the plan provides for such a distribution in these circumstances.

The plan at bar does provide for distribution after all liabilities have been satisfied. Such is not the case here, the plan has yet to be terminated. If the auxiliary fund does fall under a category where the benefits accrued equal the balance of the account, then again in order to satisfy the liabilities all must be tendered to the participant.

The general policy is to "assure that those who do participate actually receive benefits and do not lose benefits as a result of unduly restrictive forfeiture". *In Re: Moyer.* A final consideration in this case should be to balance the equities. If Essex were granted judgment they would be receiving a windfall from the money that Fort Wayne Tool & Die paid into its pension plan.

The Court therefore finds no genuine issue of fact as to the money standing in the individual auxiliary account of Mr. Nill, in trust, at the date of his retirement and that partial summary judgment should be granted on that issue in favor of Mr. Nill.

Counter-claimant, Richard G. Nill, is therefore granted partial summary judgment against Trustee and Essex Group, Inc. that Mr. Nill is entitled to and Trustee liable to pay to Mr. Nill the sum of money standing in the individual auxiliary account of Mr. Nill at the date of Mr. Nill's retirement.

DATED this 3rd day of August, 1982.

ROBERT L. HINES
Judge Robert L. Hines
Allen Superior Court

APPENDIX B

Filed
May 10, 1984
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IN THE COURT OF APPEALS OF INDIANA

Third District

ESSEX GROUP, INC.,
Plaintiff-Appellant

vs.

RICHARD G. NILL,
Defendant-Appellee

No. 3-383 A 92

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert Hines, Judge
Cause No. S-77-2042

GARRARD, J.

In 1961 Richard Nill (Nill), president of Fort Wayne Tool & Die, negotiated a trust agreement (Plan) to provide retirement and death benefits to salaried employees of the company. The Plan provided these benefits from two funds, a General Fund and an Auxiliary Fund. The employer contributed to the

General Fund in sufficient amounts to purchase insurance policies in order to provide death benefits if a participant in the Plan died prior to retirement. The employer also contributed amounts to the Auxiliary Fund sufficient to convert the insurance policies into annuities upon a participant's retirement.

In 1970, Essex Group, Inc. purchased Fort Wayne Tool & Die, Inc. and assumed responsibility for the Plan. In 1976, Nill retired prior to his normal retirement date. At that time, the Plan Trustee had credited the Auxiliary Fund with $55,244.40 in excess of the amount necessary to convert Nill's insurance policy into an annuity. Thereafter, Nill sought to receive these excess funds. The Plan Trustee brought a complaint against Nill and Essex seeking a declaratory judgment regarding the status of this money in the Auxiliary Fund.[1]

Essex appeals from a partial summary judgment in favor of Nill. The trial court held that the Essex Group, Inc. Pension Plan was a "hybrid plan," i.e. a combination defined benefit plan (the General Fund) and an individual account plan (the Auxiliary Fund) as defined in 29 U.S.C. Section 1002(35).[2]

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[1] The Plan Trustee, Indiana Bank & Trust Company, is not an active party to this appeal.

[2] "(35) The term 'defined benefit plan' means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is *based* partly on the balance of the separate account of a participant—

* * *

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are *based* upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan."

(emphasis supplied)

The trial court determined that Nill had an individual account in the Auxiliary Fund. The court reasoned that since 29 U.S.C. Section 1002(23) defined an accrued benefit in an individual account plan as the balance of an individual's account and under Section 1002(35) the Plan's Auxiliary Fund was to be treated as an individual account, Nill had a right to the entire amount allocated for his annuity conversion. The court also reasoned that in balancing the equities, a decision for Essex would result in a windfall to it since Fort Wayne Tool & Die had contributed to the pension plan from 1961-1970.

The threshhold question for us is whether the Plan is a "hybrid plan" and Nill had an individual account in the Auxiliary Fund so that he had a right to the entire amount allocated in it for his annuity conversion.

The determination of the nature of benefits due under the Plan must be derived from the Plan itself, from the *Plan definitions* of the benefit and its manner of *funding*. *Connolly v. PBGC* (6th Cir. 1978), 581 F.2d 729. The purpose of the Plan is to provide retirement income for the life of a participant or its equivalent if the participant dies prior to retirement. This purpose is implemented through the use of two funds: the Auxiliary Fund, from which funds are taken to pay for converting a participant's insurance policies into annuities; and the General Fund, from which money is withdrawn to purchase insurance policies on the lives of participants. The benefit contemplated by the Plan is either lifetime retirement income or its equivalent in death benefits.

Nill maintains that the critical aspect of the Plan is that it creates individual accounts. He points to Art. II entitled "General Statement as to Purpose" which states that the Auxiliary Fund and its investments must be "accumulated for the account of each individual . . . ." This, he maintains, reveals how contributions and accruals are to be "credited" to each participant's account. A closer reading of Art. II reveals that

"the *Auxiliary Fund* shall be credited with payments to the Trust which are to be invested by the Trustee and accumulated for the account of each individual *so that* at the normal retirement date the Trustee shall have sufficient funds on hand to pay the Insurance Company the premium necessary to convert the policy previously procured for the participant." (emphasis supplied) It is the Auxiliary Fund which is credited and the individual's resulting benefit from those contributions is limited to receiving what the Plan contemplates i.e. conversion of an insurance policy into an annuity.

As further evidence of an intent to create individual accounts, Nill points to Plan language delineating use of the Auxiliary Fund should the General Fund be inadequate to provide the full death benefit. The Trustee is directed to "pay to the participant's beneficiary as much of the auxiliary fund deposits plus accumulations to the credit of such participant at the date of his death which when added to the death benefit will amount to one hundred times the amount of his normal monthly pension." Section 6:04. Nill maintains "to the credit of such participant" in this section signifies intent to establish an individual account. We cannot agree. If the participant did indeed have full rights to the amount credited to him, he should be entitled to receive the full amount at death as well as at reitrement. Here, again, the Plan limits a participant's interest. In the case of death, it is limited to a death benefit equal to 100 times his normal monthly pension. He does not receive the entire amount credited to him in the Auxiliary Fund.

Finally, Nill argues that the Trustee is to keep a separate record of the amount deposited to the Auxiliary Fund to the account of each participant, together with any accruals thereto although no actual segregation of investments for each account is required. Nill maintains that this directive, plus the right given to a participant to inspect the Trustee's records, combine to reveal an intention that a participant has the right upon retirement, to disbursement of the auxiliary funds in "his" account.

Essex maintains that separate records, and significantly *not* separate accounts, are maintained to insure that the trustee provides sufficient funds to serve the purpose of the Plan, i.e. conversion of the participant's insurance into an annuity. Separate record keeping for each participant not only reduces the chance of error, confusion, or mistake resulting in insufficient funding for a participant, but it facilitates the ability of each participant to verify the sufficiency of the Fund earmarked for conversion of his insurance policy to an annuity.

Further evidence that the Plan does not contemplate individual accounts may be derived from definitions under the Federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001, *et seq.* In order to treat the Auxiliary Fund as an individual account plan under 29 U.S.C. Section 1002(35), the benefits must be based partly on the balance in a participant's separate account. However, here the benefit to be received by Nill, i.e. an annuity, is not *based* in any fashion on the balance in the Auxiliary Fund. The amount of the annuity is based on the amount of insurance purchased according to the Plan's fixed formula in Sections 6:01, 5:01 and 5:02.[3] The Plan contemplates a defined benefit, i.e. an annuity

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[3] "Upon receipt of an employee's executed application for participation the Trustee shall apply for and purchase from the Insurance Company a life insurance policy upon the life of such participant containing an annuity option, in an amount which will, upon the exercise of such option and payment to the insuror of the additional premiums specified therein, provide the monthly retirement income provided for such participant as calculated in Article V hereof. The Trustee shall apply for an additional policy or policies whenever a participant becomes entitled to an additional pension pursuant to the provisions of Article V.

> 5:01: The normal pension payable to a retired participant under this trust shall be an annuity which provides monthly payments commencing on the participant's normal retirement date and continuing thereafter throughout his lifetime with the

(Footnote continued on following page.)

or its equivalent in a death benefit, funded by the employer in whatever amount necessary to provide the benefit.[4]

There is only *one* benefit provided at retirement: an annuity based on the amount of insurance purchased with funds determined by a fixed formula. As such, the Plan constitutes a defined benefit plan rather than a hybrid plan. The Auxiliary Fund merely serves as a reservoir which contains at the *minimum* funds necessary to convert insurance into an annuity. Logically, then, it may be implied that an excess amount could exist. What then does the Plan provide with respect to any excess?

The primary reason for confusion regarding this Plan is that it contains no express provision for disbursement to individuals of any excess in the Auxiliary Fund except upon plan termination. While this case does not involve a plan termination, Nill argues that "[t]he only question is whether the Employees must await plan termination (upon the retirement of the last employee, or earlier if the Employer elects) to

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(Footnote continued from preceding page.)

guarantee that no less than 120 monthly payments shall be made.

5:02 The monthly amount of a participant's normal pension shall be computed as follows:

(1) Each employee eligible to participate shall receive a benefit at his normal retirement date equal to 20% of the first $400 of monthly compensation plus 40% of the earnings in excess of $400 per month.

(b) A participant's normal pension benefit shall be reduced 1/15 for each year of service less than 15 years at the normal retirement date."

[4] "8:04 In determining the amount required for deposit in the Auxiliary Fund to accumulate sufficient to make the conversions at retirement the Trustee may accept the actuarial computations of the insurance company or the Trustee may make such computations assuring such interest rate and such discounts for probable mortality and employment terminations of participants as it deems prudent and which will be acceptable to the Commissioner of Internal Revenue."

receive this dispursement [sic], or whether a disbursement of the individual account upon retirement was anticipated. Since the overall purpose of the Trust Agreement is to provide benefits upon retirement, it would seem counter-productive to hold that the retiree, who must look to his pension benefits in lieu of employment, must await some unknown future event in order to receive that which is demonstrably his." (Appellee's brief at 13).

Our reading of the Plan definitions and the Plan itself (*Connolly, supra*) reveals that a retiree is not intended to eventually receive any additional funds upon plan termination. Plan Section 14:04 states, in pertinent part:

> "The balance, if any, in the auxiliary fund shall be distributed among the *participants on the date of termination* of the Trust in the ratio that the reserve liability for each participant shall bear to the total of the reserves for all participants under the plan. The Trustee's determination of the amount allocable to each individual shall be conclusive." (emphasis supplied).

"Participant" is defined in Section 3:06 as an employee qualified to participate in the trust and on whose life a policy has been issued. An "employee" is defined in section 3:05 as any salaried person regularly employed on a full-time basis. While the definition of "policy" in Section 3:07 includes an annuity contract, a retiree is no longer a regularly employed full time employee. Upon termination of the plan, the amount remaining in the Auxiliary Fund will be distributed among those people who continue to be regularly employed on a full time basis who have qualified as participants as of the date the Plan terminates. This would *not* include retirees.

Significantly, the employees would not receive amounts in "their" individual "accounts," which would occur if these were vested accrued benefits to which they had a "right." They are to receive money from the Auxiliary Fund "in the ratio that the reserve liability for each participant shall bear to the total of the

reserves for all participants under the plan." Section 14:04. The amount, if any, each participant would receive depends on the amount of income the Auxiliary Fund has accumulated. Any amount in excess of the employer contributions is distributed pro rata among participants. This is not a characteristic of an individual account.

In addition, Section 13:01, entitled "No reversion to Employer" states that the employer shall not use funds for any purpose other than for the *exclusive* benefit of *employees*. By definition within the Plan, this excludes retirees and cannot be a basis for Nill receiving anything more than the Plan intends, i.e. an annuity.

Moreover, Section 7:04 states that upon retirement the trustee arranges for the conversion of insurance to annuities and delivers the policy to the participant who then *ceases* to be a party to the trust. Therefore, a retiree is no longer a participant and will not share in any distribution of funds from the Auxiliary Fund upon termination of the Plan.

Nill argues that when Section 8:05 states that a participant shall have no interest prior to retirement or death it implies that they *do* have an interest once they retire. Their interest, however, is limited to what the Plan is designed to provide: an annuity which will pay them a lifetime of retirement benefits.

Finally, with respect to a balance of the equities, Essex points to the fact that Nill is taking an early retirement. The Plan is designed to adjust his benefit to take this into account by paying to him the present value of his benefit due at his normal retirement date. To disburse to Nill the entire amount earmarked in the Auxiliary Fund exceeds the purpose of the Plan and in fact would serve to *encourage* rather than penalize those who decide to retire early. This is counterproductive and goes beyond any express or implied purpose inherent in the Plan.

In *In re. C. D. Moyer Co. Trust Fund* (E.D. Pa. 1977), 441 F. Supp. 1128, the employer overfunded a pension plan and subsequent to plan termination sought to enforce a plan amendment allowing the return of excess funds to it. After holding that the amendment was valid, the court noted that the result was consistent with policy under ERISA. Employers who continue to fund plans under ERISA should not be penalized for overfunding due to overcaution or miscalculation of an actuary. "Thus, employees will continue to be protected to the extent of their specific benefits, but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis." *C. D. Moyer, supra*, at 1133. The same policy under ERISA is applicable to the situation here. Nill has no reasonable expectation of acquiring any interest, at present or in the future, in any excess in the Auxiliary Fund. Any distribution of it to him would be a windfall. Essex should not be penalized for overfunding especially where the Plan was not intended to distribute any excess to retirees like Nill.

Accordingly, we reverse the court below with directions to enter judgment for Essex.

Reversed and remanded.

STATON, P.J. and HOFFMAN, J. Concur.

APPENDIX C

State of Indiana
Indianapolis, 46204
Telephone 232-1930

Clerk of the Supreme Court
and Court of Appeals

Majorie H. O'Laughlin, Clerk
217 State House

No. 3-383A92

Essex Group, Inc. V. Richard G. Nill

You are hereby notified that the Court of Appeal has on this day Appellee petition for Rehearing Denied. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 21 day of Aug., 1984

[Seal]

/s/ MARJORIE H. O'LAUGHLIN
Clerk Supreme Court and Court of Appeals

APPENDIX D

State of Indiana
Indianapolis, 46204
Telephone 232-1930

Clerk of the Supreme Court
and Court of Appeals

Marjorie H. O'Laughlin, Clerk
217 State House

No. 3-383 A 92

Essex Group, Inc. -v- Richard G. Nill

You are hereby notified that the Supreme Court has on this day Appellee's Petition for Transfer is hereby DENIED.

Givan, C.J.
All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 16th day of November, 1984

/s/ MARJORIE H. O'LAUGHLIN
Clerk Supreme Court and Court of Appeals

11/16/84 dw
No. 3-383 A 92

Alan Ver Planck, Ft. Wayne
Grant Shirley, Edward Murphy,
Ft. Wayne
John H. Heiney, Ft. Wayne

I hereby acknowledge receipt of the above notice

_____

Signature

Date _____, 19__

Attorney for ☐ Appellant
☐ Appellee

PLEASE RETURN THIS PORTION TO
THE CLERK'S OFFICE

APPENDIX E

Filed
May 13 1983
Clerk of the
Indiana Supreme and
Court of Appeals

IN THE COURT OF APPEALS OF INDIANA

ESSEX GROUP, INC.,
Appellant,

vs.

RICHARD G. NILL,
Appellee.

No. 3-383 A 92

ORDER UPON PRE-APPEAL CONFERENCE

Come now the appellant by Alan VerPlanck, the appellee Richard G. Nill by Edward L. Murphy, Jr., and the Indiana Bank & Trust Company of Fort Wayne by John H. Heiny, and this matter is presented to the Court upon Pre-Appeal Conference before The Honorable James B. Young, Judge of the Court of Appeals of Indiana.

Discussion was had with reference to the matters required by Appellate Rule 2(C) and the Court being duly advised now orders as follows:

1. The parties stipulate and agree that the caption in this cause should reflect that Essex Group, Inc. is the appellant and that Richard G. Nill is the appellee. Indiana National Bank & Trust Company of Fort Wayne is a nominal appellee but will file no brief.

2. That the parties stipulate and agree to the following facts which will be accepted as true:

a. This case was brought by Indiana Bank and Trust Company of Fort Wayne, Indiana, as Trustee of a certain pension plan, seeking instructions from the court concerning a demand by Richard Nill for disbursement of $55,244.40 in the plan's auxiliary fund.

b. The adverse parties are Richard Nill, who seeks such a disbursement and Essex Group, Inc., which opposes such a disbursement.

c. The suit arises out of a trust agreement (pension plan) established April 20, 1961, by Fort Wayne Tool & Die, Inc., applicable to full-time salaried employees of Fort Wayne Tool & Die, Inc.

d. This case was originally pleaded under theories of common law of contracts; however, in the course of these proceedings, it came to the attention of the parties that the federal Employee Retirement Income Security Act (ERISA) pre-empted state common law; and that the rule of decision applicable to this case would be guided by the ERISA provisions. [It should be noted that state courts have jurisdiction to hear and determine ERISA questions 20 USCA § 1132(a)(1)(b).]

e. Essex Group, Inc., is the successor in interest to Fort Wayne Tool & Dye, Inc., having purchased this company in 1970. Pursuant to an amendment of the pension plan Essex Group, Inc. assumed the obligations of the employer under said plan.

f. Richard Nill was the President of Fort Wayne Tool & Die, Inc., and negotiated the trust agreement on behalf of Fort Wayne Tool & Die, Inc., and is a salaried employee within the meaning of the plan.

g. At all times relevant, Indiana Bank and Trust Company of Fort Wayne, Indiana, has acted as Trustee under the terms of the 1961 trust agreement.

h. Richard G. Nill retired effective June 2, 1976.

i. At all times prior to June 2, 1976, Fort Wayne Tool & Die, Inc., and later Essex Group, Inc. as successor, made payments to Indiana Bank pursuant to the trust agreement, on account of the payment obligations set forth in said agreement.

j. Taking early retirement, Richard G. Nill received a distribution of $117,536.35 in lieu of an annuity.

k. After said distribution to Mr. Nill, there remained the sum of $55,244.40 in the auxiliary fund in the name of Richard G. Nill.

l. Mr. Nill has demanded the payment of said $55,244.40, but no part thereof has been paid to Mr. Nill by either Indiana Bank or by Essex Group, Inc.

m. At the time of Mr. Nill's retirement, the sums held in the auxiliary fund to the accounts of the other salaried employees exceeded the cost of the respective pension annuities in roughly the same proportions as Mr. Nill's auxiliary fund surplus bore to the cost of his pension annuity.

n. Indiana Bank and Trust Company of Fort Wayne maintained separate running accounts of the monies deposited in the auxiliary fund, showing what portion of the auxiliary fund the Bank has allocated to each participant. The auxiliary fund monies were, in fact, commingled for purposes of investment. The $55,244.40 amount remaining in the auxiliary fund in his name following the lump-sum distribution is consistent with the accounting kept by Indiana Bank.

o. This case comes before the Court on partial summary judgment, certified as final and appealable, in which the trial court held that the ERISA mandates disbursement of the $55,244.40. In the proceedings on the

motion for partial summary judgment, the parties did not address Richard Nill's alternative (state common law) theory that the 1961 plan should be reformed to expressly provide for the disbursement of the auxiliary fund account, and the question of such reformation is not present in this appeal.

3. The parties further stipulate and agree that the Record of Proceedings shall consist of the following documents:

a. Amended Complaint;

b. Answer and Counterclaim of Nill;

c. Reply;

d. Nill's Motion for Partial Summary Judgment;

e. Response of Essex;

f. Memorandum Decision of August 3, 1982;

g. Judgment of November 16, 1982;

h. Motion to Correct Errors and Memorandum in Support Thereof dated January 13, 1983;

i. Response of Nill dated January 28, 1982;

j. Ruling on Motion to Correct Errors on February 23, 1983; and

k. Praecipe filed March 21, 1983.

Such documents above stipulated by counsel as to their authenticity shall be indexed and presented to the Court as the Record of Proceedings in this cause without certification of the Clerk of the trial court.

4. The praecipe heretofore filed on March 21, 1983 is hereby amended to conform with the above.

5. The parties by counsel stipulate and agree that the April 21, 1983 Trust Agreement is the relevant document in issue and the same will be set forth in its entirety as a part of the appendix to the appellant's brief. In addition, that appendix shall contain applicable federal statutes, any administrative rulings cited and any other relevant documents.

6. The Record of Proceedings herein shall be filed on or before May 20, 1983 with briefing to follow in accordance with the rules.

7. The appellants anticipate requesting an oral argument.

8. The parties have discussed the possibility of settlement of this cause and will continue to make a good faith effort in that regard.

All as made and entered this 13th day of May, 1983.

Paul H. Buchanan

CHIEF JUDGE,
Court of Appeals of Indiana

APPENDIX F

Relevant portions of the Trust Agreement:

ARTICLE II

GENERAL STATEMENT AS TO PURPOSE

The general purpose of this Trust is to combine the advantages of having an Insurance Company provide any death benefit and guarantee the retirement benefits for the lifetime of the employee after he retires and to take advantage of the more flexible investment policies available to a Trust.

The object of the plan is to have the Trustee procure insurance policies on the lives of the participants which contain an option therein whereby the Insurance Company agrees to convert said policies into an annuity at the normal retirement date of each participant for an amount that will upon the exercise of the option and the payment to the Insurance Company of the additional premium specified in the policy, provide the participants a monthly retirement income as provided in this agreement.

The Trustee shall divide the Trust funds into two accounts to be termed the General Fund and Auxiliary Fund. The General Fund shall be credited with payments to the Trust equal to the annual premiums on the insurance policies procured by the Trustee on the lives of the participants and all refunds or dividend credits from said policies. The Auxiliary Fund shall be credited with payments to the Trust which are to be invested by the Trustee and accumulated for the account of each individual so that at the normal retirement date the Trustee shall have sufficient funds on hand to pay the Insurance Company the premium necessary to convert the policy previously procured for the participant to an annuity which will provide the monthly income for the remainder of the participant's lifetime.

ARTICLE III

DEFINITIONS

* * *

3:05 "Employee" shall mean any salaried person (including an officer) who is regularly employed by the Employer on a full-time basis, excluding such persons whose customary employment is for not more than 20 hours in any one week, or for not more than 5 months in any calendar year.

3:06 "Participant" shall mean an employee who has met all the qualifications necessary to participate in this Trust and on whose life a policy shall have been issued and in force subject to this Trust.

ARTICLE XI

INVESTMENT OF CONTRIBUTIONS

11:01 The Trustee shall receive, hold and manage the auxiliary fund in the manner and for the uses and purposes herein provided. It is authorized but not by way of limitation:

* * *

(k) The Trustee shall keep a separate record of the amount deposited to the auxiliary fund to the account of each participant, together with the accruals thereto, however there shall be no actual segregation of investments for each account.

ARTICLE XVIII

MISCELLANEOUS PROVISIONS

* * *

18:05 This Trust shall terminate when, but not until, in accordance with the provisions hereof, this Trust is revoked in its entirety, or there are no contracts subject hereto and the employer has fulfilled all of his obligations hereunder.